Blank Page

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 28

HERTHA J. SIBBACH,
Petitioner,

vs.

WILSON & COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN and
JAMES A. VELDE,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

Blank Page

SUBJECT INDEX.

CASES CITED.

PAGE

Cases Cited (continued).

Statutes Cited.

PAGE

STATUTES CITED (continued).

FEDERAL RULES OF CIVIL PROCEDURE CITED.

TEXTBOOKS, ARTICLES, ETC., CITED.

PAGE

TEXTBOOKS, ARTICLES, ETC., CITED (continued).

Blank Page

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. .....

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Hertha J. Sibbach respectfully shows:

(1) Statement of Matter Involved.

The petitioner (plaintiff in the trial court) brought an action against the respondent (defendant in the trial court) for damages for personal injuries in the United States District Court for the Northern District of Illinois, Eastern Division. The complaint alleged a physical injury to the plaintiff in the State of Indiana as a result of the negligence of the defendant and claimed damages (R. 1). Before trial the defendant filed a motion for an order directing

the plaintiff (together with other plaintiffs) to submit to a physical examination pursuant to Rule 35 of the Federal Rules of Civil Procedure (R. 2). The trial court ordered the plaintiff to submit to an examination by a physician named in the order (R. 3). The plaintiff refused to be examined (R. 3), and the defendant filed a petition for a rule directing the plaintiff to show cause why she should not be punished for contempt in refusing to obey the order (R. 3-4). A rule was entered and the plaintiff answered that the court was without power to enter the order directing her to submit to an examination (R. 4). By a judgment entered on July 7, 1939, the court found the petitioner guilty of contempt of court for disobedience of the order to submit to a physical examination and ordered her committed to jail until she complied with the order to submit to a physical examination or until otherwise discharged by legal process (R. 5). From the judgment of contempt and commitment the plaintiff appealed to the Circuit Court of Appeals for the Seventh Circuit, claiming that the order to submit to a physical examination was invalid (R. 6). The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that Rule 35(a) of the Federal Rules of Civil Procedure authorized the order to submit to a physical examination and was valid (R. 14-18).

(2) Basis of Jurisdiction of This Court.

(a) The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347a).

(b) Rule 35 (a) of the Federal Rules of Civil Procedure, the validity of which is involved in this case, provided in part as follows:

> "In an action in which the mental or physical condition of a party is in controversy, the court in which

the action is pending may order him to submit to a physical or mental examination by a physician."

The Federal Rules of Civil Procedure were promulgated by this Court pursuant to the so-called Rules Enabling Act (Act of June 19, 1934, c. 651, secs. 1, 2; 48 Stat. 1064; 28 U. S. C. 723b, 723c), of which section 1 provided in part as follows:

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

(c) The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 13, 1939 (R. 18).

(3) Questions Presented.

The judgment of the Circuit Court of Appeals sought to be reviewed affirmed a judgment of the District Court holding the petitioner in contempt of court for disobeying an order of the District Court that directed the petitioner to submit to a physical examination pursuant to Rule 35 of the Federal Rules of Civil Procedure. The petitioner refused to obey the order directing her to submit to a physical examination on the ground that Rule 35 is invalid as to her (R. 4, 6). The question presented by this petition is: Does Rule 35 of the Federal Rules of Civil Procedure abridge or modify the substantive rights of the petitioner contrary to the provisions of the Rules Enabling Act? If so, the order entered under Rule 35 directing the petitioner

to submit to a physical examination exceeded the power of the trial court, and the judgment of contempt for disobedence of the order was invalid.

(4) Reasons for Allowance of Writ.

The Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court. As indicated above, the question is the validity as to the plaintiff, a litigant in a federal court sitting in Illinois, of Rule 35 of the Federal Rules of Civil Procedure. The decision of the Circuit Court of Appeals holds that this Court was authorized to adopt Rule 35 by the Rules Enabling Act. The petitioner contends that Rule 35 is invalid because it modifies and abridges her substantive rights contrary to the express provisions of the Rules Enabling Act. The importance of the question of the validity of Rule 35 as to the petitioner is obvious: on its determination will depend the future availability of the remedy provided by Rule 35 in federal courts sitting in Illinois and other states. Also, this question involves another question of wider significance: the meaning of the term "substantive rights" in the Rules Enabling Act. This larger question has been the subject of much discussion and doubt, particularly in connection with the case of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). See Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad* v. *Tompkins* (1939), 34 Ill. L. Rev. 271, 279 *et seq.*; Hart, *Business of the Supreme Court at the October Terms, 1937 and 1938* (1940), 53 Harv. L. Rev. 579, 606-611, n. 62 at p. 610. That these questions have not been, but should be, settled by this court is shown by the annexed brief in support of this petition.

It is submitted that these reasons call for the exercise of this Court's power of review.

Wherefore, the petitioner respectfully prays: that a writ of certiorari be issued out of and under the seal of this Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this Court for its review and determination on a day certain named therein a complete transcript of the record in the case numbered and entitled on its docket as No. 7048, Hertha J. Sibbach, Plaintiff-Appellant, *v.* Wilson & Company, Inc., Defendant-Appellee; that the judgment of the Circuit Court of Appeals may be reversed by this Court; and that the petitioner may have such other and further relief as seems just.

HERTHA J. SIBBACH,
Petitioner.

By LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN and
JAMES A. VELDE,
Of Counsel.

Blank Page

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. .....

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(a) Index.

An index to this brief with tables of authorities cited appears at pp. i-v preceding the Petition, *supra*.

(b) Opinion of the Court Below.

The opinion of the Circuit Court of Appeals (R. 14-17) is reported in *Sibbach* v. *Wilson & Company, Inc.*, 108 F. (2nd) 415 (1939).

(c) Statement of Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the Petition, *supra*, p. 2, under the heading, "Basis of Jurisdiction of this Court" and is not repeated here in the interest of brevity.

(d) Statement of the Case.

A statement of the case appears in the Petition, *supra*, p. 1, under the heading "Statement of the Matter Involved" and is not repeated here in the interest of brevity.

(e) Specification of Errors.

The Circuit Court of Appeals erred in holding that the order directing the petitioner to submit to a physical examination and the judgment of contempt and commitment for disobedience of the order were valid; and in affirming the judgment of the District Court.

(f) Argument.

SUMMARY OF ARGUMENT.

I. The Background of Rule 35 and the Scope of the Question Presented.

II. Rule 35 Abridges the Substantive Rights of the Plaintiff.

A. The Substantive Rights which the Rules Enabling Act Forbade to Be Modified by the Federal Rules of Civil Procedure Include Rights Not Determinative of the Ultimate Result of Litigation.

(1) "Substantive rights" and "procedure" and the doctrine of the separation of powers.

(2) The limitation contained in the Rules Enabling Act.

I. The Background of Rule 35 and the Scope of the Question Presented.

Text of Rule 35

The title and text of Rule 35 of the Federal Rules of Civil Procedure are as follows:

"Rule 35. Physical and Mental Examination of Persons

"(a) Order for Examination. In an action in which the mental or physical condition of a party is

in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

"(b) Report of Findings.

"(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

"(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition."

Text of Rules Enabling Act

The text of the Rules Enabling Act pursuant to which Rule 35 and the other Federal Rules of Civil Procedure were promulgated is as follows:

> "Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.
>
> "Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." (Act of June 19, 1934, c. 651, Secs. 1, 2 (48 Stat. 1064), U. S. C. Title 28, Secs. 723b, 723c.)

Rule in Federal Courts Before Adoption of Rule 35

Before the adoption of Rule 35 by this Court, a federal court had no power to order a plaintiff to submit to a physical examination unless a statute of the state in which

the federal court was sitting provided for the order. This Court held in *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250 (1891), that a federal judge did not have power to compel a plaintiff to submit to a physical examination; and in *Camden & Suburban Railway Company* v. *Stetson*, 177 U. S. 172 (1900), that, if a state statute provided that a plaintiff could be ordered to submit to a physical examination, a federal judge sitting in a federal court in that state could order a plaintiff to be examined under the authority of the Rules of Decision Act (sec. 34, Judiciary Act of 1789, Rev. Stat. sec. 721; 28 U. S. C. sec. 725) applied in connection with the state statute. The *Botsford* and *Stetson* cases are discussed fully in this brief at pp. 30 to 33 and 34 to 38, respectively.

Rules in the State Courts

In the state courts there have been three different situations with reference to the power of a court to order a physical examination.

(a) In some states, as in Illinois, the courts have held that they had no power to compel a plaintiff to submit to a physical examination, following in some cases the lead of this Court in the *Botsford* case. See 4 Wigmore on Evidence (2d ed. 1923) 729, footnote 13, which cites cases.

(b) In other states, the courts have held that a trial court had inherent power to enter the order. See Wigmore on Evidence, op. cit. *supra*. The leading case so holding has been *Schroeder* v. *R. Co.*, 47 Iowa 375 (1877), which was discussed but not followed by this Court in the *Botsford* case.

(c) In some states the physical examination of parties before trial is authorized by statute. The statutes of six states—Arizona, Michigan (court rule), New Jersey, New

York, South Dakota, and Washington—are cited in the note to Rule 35 in *Notes to the Rules of Civil Procedure for the District Courts of the United States*, March, 1938, p. 32, prepared and printed under the direction of the Advisory Committee on Rules for Civil Procedure. In at least one of those states (New York), it was held before the enactment of the statute that a court did not have power to order the examination without a statute. *McQuigan* v. *Ry. Co.*, 129 N. Y. 50, 29 N. E. 235 (1891).

The Illinois Cases

The Illinois decisions, which are particularly important in the instant case because it was brought in a United States District Court in Illinois, show a strong policy *against* the granting of orders to compel a plaintiff to submit to a physical examination. In *Peoria, D. & E. Ry. Co.* v. *Rice*, 144 Ill. 227, 33 N. E. 951 (1893), after stating that the Illinois court is committed to the doctrine that a trial court has no power to order the examination, the opinion continued (p. 232):

> "We do not think injustice is likely to result to a defendant by a refusal to make such an order, especially when given the full benefit of the fact that the plaintiff has refused to submit voluntarily thereto, as was done in this case, both by evidence and instructions to the jury. *The contrary rule would often operate harshly upon the plaintiff, result in embarrassment to the court in trying cases, and be very liable to abuse.* Rules of practice must be laid down, not with reference to a single case, but to be applied generally, and we entertain no doubt that our conclusion heretofore announced on this subject is the better and safer practice." (Citing earlier Illinois cases as well as the *Botsford* case; italics supplied.)

In *Mattice* v. *Klawans*, 312 Ill. 299, 143 N. E. 866 (1924), the Illinois court held that the policy behind the rule denying the power to order the examination made it improper to ask the plaintiff before the jury whether or not he was willing to submit to an examination. The opinion stated at p. 307:

> "The settled law of this State is that the plaintiff in an action of this kind cannot be required to submit to a physical examination as to his injuries (*City of Chicago* v. *McNally*, 227 Ill. 14), and it is but an evasion of that rule to permit the plaintiff to be required to state to the jury that he is not willing to submit to such an examination. To permit such a question to be asked in the presence of the jury practically compels him to submit to the examination because of the unfavorable effect likely to be produced upon the minds of the jury if he refuses. Medical experts are not infallible, and however conscientiously and carefully the examination is made there is a possibility that an erroneous conclusion may be reached. There is no law under which the court could direct or control such an examination, and until the people of this State, acting through their representatives in the General Assembly, determine that the administration of justice requires that such authority be vested in the courts, defendants in personal injury actions will not be permitted to do indirectly what they cannot do directly."

This quotation was summarized with approval in *People* v. *Scott*, 326 Ill. 327, 157 N. E. 247 (1927), where it was held to be improper for the court in an insanity hearing to permit the state to show that the defendant had refused to allow physicians appointed by the court to examine him. In that case the reason given against the ordering of a

mental examination by the court in an insanity hearing—the undue weight that the jury would attach to the testimony of the court physician—applies with equal force to an action for personal injuries. The language of the opinion was as follows (326 Ill. 347):

> "It is apparent that if the court were permitted, either on his own motion or on that of the People, to select experts to examine a defendant as to his sanity, it would not be possible to keep the fact from the jury that they were the court's witnesses selected for such purpose, and it would not be possible to keep the prosecutor from arguing to the jury that they were the really fair witnesses and the only fair and competent witnesses testifying on such question, and that an inquiry into the sanity of a defendant in that manner would be simply a farce."

The strong policy in Illinois against the ordering by the court of a physical examination is apparent. The decisions go further than holding that the courts do not have power to order a physical examination. The policy behind that rule is protected by the further holding that the plaintiff may not be asked at the trial about his or her willingness to submit to the examination.

Scope of Question Presented

The plaintiff contends in this case that an order for a physical examination may not be granted under Rule 35 in a federal court sitting in a state, as Illinois, where there is no state statute providing for the order and where the state courts hold the order to exceed a court's power. The Rules Enabling Act quoted above (p. 11) provided that the rules should not "abridge the substantive rights of any litigant." Plaintiff contends that Rule 35 abridges her

substantive rights because she has a right in the Illinois courts not to be compelled to submit to a physical examination; and that Rule 35 is thus invalid as to her. The result sought here by the plaintiff as to Rule 35 accords with the result reached as to Rule 8(c) in *Francis* v. *Humphery*, 25 F. Supp. 1 (E. D. Ill. 1938). Rule 8(c) provides that the defendant must plead affirmatively the plaintiff's contributory negligence. This provision was held invalid as a modification of the defendant's substantive rights in Illinois, where the courts require the plaintiff to allege and prove his freedom from contributory negligence.

It may be that Rule 35 does not abridge substantive rights of litigants in federal courts sitting in states where state statutes, as noted above at p. 12, permit orders for physical examinations. The principles laid down in the *Stetson* case (cited above at p. 12) seem to validate Rule 35 in federal courts in those states. Also, it may be that Rule 35 does not abridge substantive rights in federal courts sitting in states where the courts have held (as noted above at p. 12) that they have inherent power to order a physical examination irrespective of statute. The *Stetson* case held that the Rules of Decision Act permits a federal court to follow a state statute granting the power to order a physical examination (this point is discussed herein at p. 38). Under the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the Rules of Decision Act requires a federal court to follow state court decisions. As a result, aside from Rule 35, a federal court is perhaps required to order a physical examination in a proper case if the state court decisions in the state where the federal court sits require the order. If this is true, in federal courts in those states Rule 35 may not abridge substantive rights and may be valid.

This case involves only one aspect of Rule 35—the grant of power to order a physical examination as made in subdivision (a) of the rule. Paragraph (2) of subdivision (b) of the rule provides that, if a plaintiff who has been examined under court order requests and obtains a copy of the examiner's report, any privilege of the plaintiff as to other physical examinations is thereby waived. It may be that the argument made by the plaintiff in this brief would indicate that this provision for waiver of a privileged communication by a patient to a physician modifies substantive rights and is invalid. However, the physician-patient privilege is statutory and there is no statutory provision for it in Illinois. Consequently, this case does not involve the validity of paragraph (2) of subdivision (b) of Rule 35.

If this Court holds Rule 35 to be invalid as to the plaintiff as argued in this brief, it may be argued that the order here attacked may be upheld on another ground. The alleged negligent act of the defendant and the plaintiff's injury occurred in the State of Indiana. It has been held in Indiana that a court has inherent power to order a plaintiff to submit to a physical examination. *City of South Bend* v. *Turner*, 156 Ind. 418, 60 N. E. 271 (1901). Is it incumbent on a federal court sitting in Illinois to follow this Indiana rule? Plaintiff contends that it is not, that the law of Illinois—the law of the forum—governs. Point IV of this brief (pp. 51 to 54) contains the argument on this point.

II. Rule 35 Abridges the Substantive Rights of the Plaintiff.

A. The Substantive Rights which the Rules Enabling Act Forbade to be Modified by the Federal Rules of Civil Procedure Include Rights not Determinative of the Ultimate Result of Litigation.

The Rules Enabling Act (quoted above in this brief at p. 11) provided that the Federal Rules of Civil Procedure should not "modify the substantive rights of any litigant." It may be that an order compelling the plaintiff to submit to a physical examination does not determine the right which the plaintiff seeks to have adjudicated in the litigation. And not involving a right of this character, the order may involve "procedure" and may not involve what is commonly meant by the term "substantive law." Plaintiff contends that the order nevertheless invades her "substantive rights." This contention requires a consideration of the meaning of the limitation in the Rules Enabling Act in the light of the limitations imposed on the rule-making power of courts by the doctrine of the separation of powers.

(1) *"Substantive rights" and "procedure" and the doctrine of the separation of powers.*

In several early cases this Court upheld the validity of rules of court promulgated pursuant to Acts of Congress. *Wayman* v. *Southard,* 10 Wheat. 1 (1825); *Bank of U. S.* v. *Halstead,* 10 Wheat. 51 (1825); *Beers* v. *Haughton,* 9 Peters 329 (1835). In the *Wayman* case, Mr. Chief Justice Marshall, after quoting the 17th section of the Judiciary Act of 1789 and the 7th section of an additional Act (Act of 1793, ch. 22, s. 7), continued as follows (pp. 42 and 43):

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which

are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

And in the *Beers* case, although the question there involved was merely one of a rule concerning a writ of execution, Mr. Justice Story indicated how broad he considered the rule-making power delegable by Congress to the courts by saying (9 Peters 360) that it embraced "the whole progress of * * * (the) suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied."

Limitations on the rule-making power have also been noted by this Court. The opinion in the *Wayman* case,

quoted above, said that Congress may not delegate to the courts "powers which are strictly and exclusively legislative." And recently the function of the rule-making power and the limitations attending it were discussed in the opinion of Mr. Justice Brandeis in *Washington-Southern Nav. Co.* v. *Baltimore & P. S. Co.*, 263 U. S. 629, (1923) at p. 635:

> "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process, and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. *Nor can a rule abrogate or modify the substantive law.* This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred." (Italics supplied.)

The difficulty of determining whether or not a particular matter is delegable by Congress to the courts was noted in the *Wayman* case, where Mr. Chief Justice Marshall used the terms "judicial" and "exclusively legislative" to describe what may and what may not be delegated. Neither he nor the other judges in the three early cases cited above used the word "procedure," and that word was not used in the statutes considered in those cases. More recently the word "procedure" has been used to describe the sub-

ject-matter over which the power to make rules may be delegated to the courts. Of the many quotable examples, see *Rules of Court Case*, 204 Wis. 501, 236 N. W. 717 (1931) where the opinion (p. 505) speaks of the "power to regulate procedure" as judicial. And the term "substantive law" is often used, as in the quotation above from the *Washington-Southern Navigation Company* case, to describe what may not be dealt with by court rule—*i. e.* what may not be delegated by the legislature to the courts. The determination of whether a particular matter involves "procedure" or "substantive law" is frequently difficult. Mr. Justice Reed noted recently in *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64, 92 (1938) that "'the line between procedural and substantive law is hazy.'" The difficulty is aggravated by the fact that these terms are used as criteria in other fields of the law. See Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L. J. 333 (1933), where the distinction is noted as being used to determine whether the law of the forum or some other law governs, to determine whether or not a statute violates the *ex post facto* clause of the Constitution, to determine whether or not the legislature intended a statute to be given a retrospective effect, etc.

Judicial decisions determining that a particular matter is "procedural" or "substantive" with reference to one type of problem are not likely to aid in solving another type of problem. The verbal criteria provided by these words tend to obscure the true function of the rules of law sought to be applied. For this reason, no attempt is made in this brief to apply to the problem at hand the judicial decisions that there may be in other fields of the law with reference to the terms "substance" and "procedure," although a few cases of this kind are necessarily mentioned to indicate an approach to the problem.

The definition of "procedure" most often quoted is that in the opinion of Mr. Justice Miller in *Kring* v. *Missouri*, 107 U. S. 221, 231 (1882):

> "The word *procedure*, as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on criminal law in America has adopted it as the title to a work of two volumes. Bishop, Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: 'S.2. The term procedure is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence and practice.' And in defining practice, in this sense, he says: 'The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;' and evidence he says, as part of procedure, 'Signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.' "

Many definitions of "substantive law" are of the same effect as that found in Black's Law Dictionary, (2nd Ed.) 1910:

> "That part of the law which creates, defines, and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion."

Both definitions indicate the broad scope of these terms. They are so broad that they seem clearly to overlap. "Procedure" includes "pleading, evidence, and practice"—the

entire course of a legal proceeding. That the rule-making power covers this field was indicated by Mr. Justice Story in the *Beers* case cited above, although the word "procedure" was not used. "Substantive law" deals with "rights." Does the field of "rights" excluded from the rule-making power include only the rights that determine the outcome of litigation, the ultimate rights sought to be adjudicated by the litigants? It was apparently rights of this character that Mr. Justice Brandeis had in mind in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938), in speaking of "substantive rules of common law" which Congress has no power to declare as applicable in a state. Clearly Congress may not delegate to the courts the power to declare by rule what rights of this character exist.

There are also important rights of another character. Procedural devices may invade or affect human rights that the common law has long sought to protect. It is arguable that the doctrine of the separation of powers alone, apart from other constitutional limitations, forbids Congress to delegate rule-making power as to a procedural device of this character, even though it does not involve rights that determine the outcome of litigation. Avoiding the terms "procedure" and "substantive law," this question involves a consideration of whether the particular matter is "exclusively legislative" or "judicial."

This consideration in turn involves the function in our legal system of the power of courts to make rules. In *Wayman* v. *Southard*, 10 Wheat. 1, 43 (U. S. 1825), Mr. Chief Justice Marshall indicated the function of the rule-making power, when, after mentioning the enactment of "general provisions" by the legislature, he referred to the "power given to those who are to act under such general provisions *to fill up the details.*" The chief reason given

for the promulgation of rules by the courts rather than by the legislature is that the legislature does not have the time or specialized knowledge required for the preparation of a detailed code of practice. Thus it has been said by one who has played a large part in the movement for procedural reform by extension of the rule-making power that the legislature should only prescribe the general lines to be followed, leaving the court to work out detailed regulations by rule. See Roscoe Pound, *Some Principles of Procedural Reform*, 4 Ill. Rev. 388 (1909), at page 403:

> "A Practice Act should deal only with the general features of procedure and prescribe the general lines to be followed, *leaving details to be fixed by rules of court*, which the courts may change from time to time as actual experience of their application and operation dictates." (Italics supplied.)

If a particular matter involves a detail of practice with which a court is more familiar than the legislature, the matter seems to be within the delegable rule-making power. But if the matter involves a general principle or a question of public policy that the legislature is able to pass on (and perhaps which can be most effectively considered in a forum where there are opportunities for full debate), the matter should not be dealt with by a rule of court but by a legislative enactment. This criterion makes it possible to avoid the possibly misleading terms "substantive law" and "procedure." At the same time it is more accurate than the verbal criteria provided by those terms, because a matter of procedure may involve a broad policy that seems to be within the exclusive competence of the legislature.

Obvious examples of procedural devices that affect important rights and so involve broad questions of policy are those that violate constitutional limitations, such as the due process clause. Another illustration involving a con-

stitutional guaranty is found in a case already cited, *Kring* v. *Missouri*, 107 U. S. 221 (1882), where the definition of procedure quoted above is found. It was contended there that a law passed after a criminal offense was not invalid *ex post facto* legislation because the change made by the law was merely in "criminal procedure." Mr. Justice Miller indicated that the word "procedure" did not furnish the determining criterion (p. 232):

> "And can any substantial right which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

There are rules of evidence that do not involve rights guaranteed by the constitution but that do involve important questions of public policy. Common law privileges and inhibitions against testifying—such as the disability of a party to testify or the disability of one spouse to testify for or against the other—are a part of the law of evidence and so within the field of "procedure." Yet the question of whether or not they should have a place in our legal system is of great public interest, is an important question of public policy. May Congress delegate to the courts the power to determine this question by the promulgation of a court rule?

Whether or not courts should have the power to render declaratory judgments involves the basic purposes of the judicial system. Yet in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240, the operation of the Declaratory Judgment Act was characterized by Mr. Chief Justice Hughes as "procedural only." Surely this does not mean that the courts may decide by the making of a rule that declaratory judgments may or may not be rendered. If so, it

would seem that the Federal Rules of Civil Procedure could have forbidden this remedy recently provided by the Declaratory Judgment Act (Act of June 14, 1934, 48 Stat. 955, 28 U. S. C. Sec. 400).

This line of argument would seem to indicate that there are "procedural" matters that involve such broad and important questions of policy that the power to make rules about them may not be delegated by Congress to the courts under the doctrine of the separation of powers. However, in the instant case it is not necessary to pursue this line further in view of the language of the Rules Enabling Act. It may be that the doctrine of the separation of powers does not forbid Congress to delegate to this Court the power to decide by rule whether or not a plaintiff may be compelled in a federal court to submit to a physical examination. But it is contended here that Congress has not in fact delegated the power by the Rules Enabling Act.

(2) *The limitation contained in the Rules Enabling Act.*

The Rules Enabling Act (quoted in full in this brief at p. 11) granted the power to make rules in actions at law (as in the case at bar) in the following language:

> "Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the *practice and procedure* in civil actions at law. *Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.*" (Italics supplied.)

The first sentence gives the Supreme Court power to prescribe "practice and procedure" by rules. The second sentence says that the rules shall not "abridge . . . the substantive rights of any litigant." The second sentence seems clearly to have been intended as a limitation on the grant of power in the first.

The fact that the second sentence was used seems to indicate that Congress believed that a rule of procedure could affect substantive rights. As noted above (p. 22) "procedure" is a broad term, including pleading, evidence, and practice, and "substantive law" and "substantive rights" are also broad terms. "Substantive law," it may be, is most commonly used to denote those ultimate rights which determine the outcome of litigation. But as noted above there are other important rights that may be affected by procedural devices, rights that involve questions of public policy. Apparently Congress believed that, since procedure may extend to the line where "substantive law" (*i. e.* the rights determinative of litigation) begins, it was desirable for it not to delegate to the Court the power to make rules that abridge, enlarge, or modify important rights that are involved in some matters of procedure. It is significant that the Rules Enabling Act uses the words "substantive rights" rather than "substantive law."

If rules of "procedure" could not be construed to involve "substantive rights," there was no need for the second sentence in the Rules Enabling Act and the second sentence would be surplusage. Common as is the fault of wordiness in legislative drafting, it seems unlikely that such emphatic and mandatory language as that in the second sentence was merely a draftsman's flourish. It seems

rather that the second sentence was intended to be an important limitation on the broad grant of power in the first.

Another interpretation was placed on the Rules Enabling Act in an article on the rule-making power under the Act by Professor Edson R. Sunderland (*Character and Extent of the Rule-making Power granted U. S. Supreme Court and Methods of Effective Exercise,* 21 A. B. A. Journ. 404, 1935). Professor Sunderland pointed out the difficulty that has existed in numerous different types of problems in drawing a distinction between "pleading, practice, and procedure" and "substantive rights." He concluded his discussion of what is included in the term "procedure" as follows (p. 406):

> "If this interpretation of the scope of procedure is approved, the new federal rules may include the right to use, and the manner of using, every proceeding, operation, expedient, or device capable of contributing to the progress of the cause, from the beginning to the end of the litigation, including mesne and final process and every type of auxiliary remedy, but *they should not deal in any way with the character of the rights which are to be determined by the final judgment.*" (Italics supplied.)

This statement seems to overlook the possibility that there are substantive rights in addition to "the rights which are to be determined by the final judgment." A similar interpretation was apparently placed on the Rules Enabling Act by Mr. William D. Mitchell, the Chairman of the Advisory Committee appointed to assist this Court in promulgating the rules. Speaking in Cleveland, he indicated his belief that the second sentence in the Act was "surplusage." *Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute,* Cleveland, 1938, p. 182.

In addition to the arguments already made, a consideration of the consequences of interpreting the Rules Enabling Act as giving this Court power to regulate the broad field of "procedure" without any limitations (except, of course, those imposed by the Constitution) indicates that the intention of Congress was otherwise. Some of the consequences would be: since "procedure" includes evidence, this Court could construct by rule a complete system of the law of evidence; not only could common law privileges and inhibitions against testifying be removed by rule, but new privileges and inhibitions could be added; this Court could impose by rule a privilege on communications between patient and physician that could be claimed in federal courts sitting in states where, as in Illinois, there is no such privilege; also, as noted above (pp. 25-6), this Court could perhaps repeal the Declaratory Judgment Act.

It is true that Congress retained a measure of surveillance over the rules to be made pursuant to the Rules Enabling Act, the second paragraph of which required the united rules for cases in equity and action in law to be reported to Congress. It is also true that the grant of power to make rules was very broad and that it is desirable that the power should be broad. But the language of the Rules Enabling Act, when considered in the light of the separation of powers, seems clearly to forbid the modification by rule of rights which, though lying within the field of "procedure", involve important questions of public policy.

Thus, even though compliance by the plaintiff with an order directing her to submit to a physical examination does not in theory have a determinative effect upon the right sought to be adjudicated in the litigation, her "substantive" rights as Congress used the term may nevertheless be abridged if she is compelled to comply with the order.

B. Decisions of This Court Indicate that an Order for a Physical Examination Modifies Substantive Rights.

This Court has rendered decisions in two cases involving an order against a litigant to submit to a physical examination. The first case held that a federal court in Indiana had no power to enter the order. The second case held that a federal court in New Jersey (where a state statute provided for the order) did have power to enter the order. Both cases show clearly that such an order involves substantive rights. The importance of these cases requires a detailed analysis of them.

The first case was *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250 (1891). An action for damages for personal injuries caused by the defendant's alleged negligence was tried in a federal court in Indiana. The defendant made a motion before the trial for an order to direct the plaintiff to submit to a physical examination. The trial court overruled the motion on the ground that the court had no power to make and enforce the order. After verdict and judgment for the plaintiff, the defendant sued out a writ of error to the Supreme Court, where the judgment of the trial court was affirmed.

The opinion of Mr. Justice Gray stated emphatically that the question involved an important "right" of the plaintiff (pp. 251 and 252):

> "*No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint* or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's

person may be said to be a right of complete immunity: to be let alone.' Cooley on Torts, 29.

"For instance, not only wearing apparel but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process, or execution for debt, or writ of replevin. 3 Bl. Com. 8; *Sunbolf* v. *Alford*, 3 Mees. & W. 248, 253, 254; *Mack* v. *Parks*, 8 Gray, 517; *Maxham* v. *Day*, 16 Gray, 213.

"*The inviolability of the person is as much invaded by a compulsory stripping and exposure, as by a blow.* To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." (Italics supplied.)

After discussing a limited group of cases in which the early English courts ordered physical examinations, the opinion stated (p. 253) that the English courts had never entered orders for a physical examination in tort cases:

"So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history."

The opinion indicates that in a civil action a person may not be compelled to expose his body *at the trial.* Counsel

in the case had argued that, since a party may exhibit his wounds to the jury to enable a surgeon to testify, the court could compel an examination. The opinion answered (p. 255):

> "But the answer to this is, that anyone may expose his body, if he chooses, with a due regard to decency and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent."

Mr. Justice Gray discussed decisions of state courts (some had denied an order for the physical examination of the plaintiff in an action for a personal injury and others had granted the order) and concluded: "On mature advisement we retain our original opinion that such an order has no warrant of law" (p. 256).

The court held that the question was not governed by the Conformity Act. The trial was held in a federal court in Indiana and the opinion stated (p. 256) that opinions of the highest court of Indiana were "conflicting and indecisive" on the question. There was no statute in Indiana that specifically permitted an order for a physical examination. The opinion then continued (p. 256):

> "But this is not a question which is governed by the law or practice of the State in which the trial is had. It depends upon the power of the national courts under the Constitution and laws of the United States."

And after speaking of the power of discovery or inspection conferred upon courts by Congress, the opinion said that section 914 of the Revised Statutes (this is the Conformity Act, 28 U. S. C. sec. 724) "neither restricts nor enlarges the power of these courts (the courts of the United States) to order the examination of parties out of court."

The *Botsford* case thus holds unequivocally that an order directing a litigant to submit to a physical examination abridges and modifies a substantive right. It is true that the word "substantive" was not used. But the right to be free from physical restraint was termed a "right," was characterized as "sacred," and no right was said to be "more carefully guarded by the common law." It is difficult to conceive of language that would more emphatically indicate a right to be substantive.

The decision in the *Botsford* case was followed in a Massachusetts case in which the opinion was written by a former Justice of this court. In *Stack* v. *N. Y. etc. Railroad*, 177 Mass. 155, 58 N. E. 686 (1900), it was held that the trial court did not have power to compel the plaintiff in an action for damages for personal injuries to submit to a physical examination. The opinion of Mr. Justice Holmes, who was then Chief Justice of the Massachusetts court, contained the following language (p. 157, citing the *Botsford* and other cases):

> "* * * we agree with the Supreme Court of the United States, the New York Court of Appeals, and some other able courts, that the power does not exist. * * * But if the power should be deemed needful to a more perfect administration of justice, the remedy should be furnished by the Legislature, which as yet has not gone so far. * * * We cannot doubt that as matter of history the power which we are asked to assert was of a kind rarely claimed or exercised by common law courts. * * * It also is true, perhaps with some reservations, as observed by Mr. Justice Gray in the Supreme Court of the United States, that *the common law was very slow to sanction any violation of or interference with the person of a free citizen.* The few and obsolete cases in which the judges or

a jury inspected the person of a party have little bearing on the court's power to order him to submit to inspection in order to qualify a witness."

(at p. 158):

"* * * And, if that be material, we are not aware that the English Chancery ever has made such an order as was asked here (an order to compel plaintiff to submit to a physical examination). * * * In the present case we perceive no such pressing need of our anticipating the Legislature as to justify our departure from what we cannot doubt is the settled tradition of the common law to a point beyond that which we believe to have been reached by equity, and beyond any to which our statutes dealing with kindred subjects ever have seen fit to go. It will be seen that we put our decision not upon the impolicy of admitting such a power, but on the ground that *it would be too great a step of judicial legislation to be justified by the necessities of the case.*" (Italics supplied.)

This opinion of Mr. Justice Holmes verified what was said in the *Botsford* case on the questions of legal history there involved. Also, it indicates that the English Court of Chancery, extensive as was its power of discovery, did not compel a party to submit to a physical examination.

The second case in this Court was *Camden & Suburban Railway Company* v. *Stetson*, 177 U. S. 172 (1900). It held that a federal court sitting in a state where a state statute provided for an order for a compulsory physical examination could order a physical examination under the Rules of Decision Act. The plaintiff, a citizen of Pennsylvania, sued a corporation in New Jersey for damages for personal injuries caused by an allegedly negligent act that occurred in New Jersey. A New Jersey statute provided that the plaintiff could be ordered to submit to a physical

examination in an action for damages for personal injuries. Before the jury was impaneled the defendant's counsel asked in open court that the plaintiff submit himself to a physical examination. The plaintiff did not consent and the trial court ruled that it had no power to order the examination. On review of the case by the Circuit Court of Appeals, the following question was certified to the Supreme Court: "Had the circuit court the legal right or power to order a surgical examination of the plaintiff?" The question was answered in the affirmative.

At the outset of the opinion Mr. Justice Peckham reaffirmed the holding of the *Botsford* case, but distinguished it on the ground that a state statute was not there involved (p. 174):

> "It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it. *Union P. R. Co.* v. *Botsford*, 141 U. S. 250, 35 L.ed. 734, 11 Sup. Ct. Rep. 1000. In that case there was no statute of the state in which the United States court was held which authorized the order. There is no intimation in the opinion that a statute of a state directly authorizing such examination would be a violation of the Federal Constitution, or invalid for any other reason."

And a federal statute was quoted as making the state statute operative:

> "In this case we have such a statute, and by section 721 of the Revised Statutes of the United States it is provided that 'the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases in which they apply.'"

Section 721 of the Revised Statutes is the statute known as the Rules of Decision Act (sec. 34, Judiciary Act of 1789; 28 U.S.C. sec. 725). The opinion (p. 174) said that the New Jersey statute did not involve a question of general law which a federal court was not compelled to follow under the doctrine of *Swift* v. *Tyson*, 16 Pet. 1 (1842):

> "The statute concerns the evidence which may be given on a trial in New Jersey, and it does not conflict with any statute of the United States upon that subject. It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the state to recover damages for injury to the person. The statute comes within the principle of the decisions of this court holding a law of the state of such a nature binding upon Federal courts sitting within the state. *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L.ed. 865, 871; *Nichols* v. *Levy*, 5 Wall. 433, 18 L.ed. 596; *Watson* v. *Tarpley*, 18 How. 517, 520, 15 L.ed. 509, 511; *Ex parte Fisk*, 113 U.S. 713, 28 L.ed. 1117, 5 Sup. Ct. Rep. 724."

The opinion said that the New Jersey statute did not violate the Federal Constitution (p. 175):

> "We are not aware of any reason why this law of the state does not apply to courts of the United States under the section of the Revised Statutes above quoted. There is no claim made that the statute violates the Federal Constitution, and we are of opinion that such a claim would have no foundation, if made."

Mr. Justice Peckham again distinguished the *Botsford* case and pointed out how the Rules of Decision Act, in connection with the New Jersey statute, permitted an order for a physical examination (p. 175):

"We do not dispute that if there were no law of the United States which, in connection with the state law, could be referred to as in effect providing for the exercise of the power, the court could not grant the order under the decision in the case of Botsford. But we say there is a law of the United States which does apply the laws of the state where the United States court sits; and where the state has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in Federal courts sitting in that state. In the *Botsford* case there was no state law, and consequently no foundation for the application of the law of the United States."

And after again re-affirming the *Botsford* case, the opinion concluded (p. 177):

"But by reason of the statute of New Jersey, in which state this action was brought, there being no law of Congress in conflict therewith, we hold that the courts of the United States therein sitting have the power, under the statute and by virtue of sec. 721 of the Revised Statutes of the United States, to order the examination of the person of the plaintiff * * *".

The opinion of Mr. Justice Peckham in the *Stetson* case thus indicated clearly that the Court did not there modify the holding in the *Botsford* case that an order for a physical examination invades a substantive right of a litigant and that a federal court had no power to enter the order in the absence of a federal statute. As noted above, the opinion in the *Botsford* case intimated that the Conformity Act did not govern the question. This intimation was affirmed by the decision in the *Stetson* case. The *Stetson* case held

clearly that the Rules of Decision Act, and not the Conformity Act, was the federal statute that authorized the federal court to apply the state statute.

The Conformity Act deals with "practice, pleadings, and forms and modes of proceeding" (Rev. Stat. sec. 914; 28 U.S.C. sec. 724), language that seems very close to what is commonly understood by the word "procedure". On the other hand, the Rules of Decision Act has always been considered to deal with substantive law or substantive rights. In the first case construing the Act, Chief Justice Marshall said that it "has no application to the practice of the court. * * *" (*Wayman* v. *Southard*, 10 Wheat, 1, 26; 1825). Recent text-writers speak of the Act as governing substantive law or substantive rights. "This statute refers only to substantive law and has no application to procedure in federal courts" (3 Foster, *Federal Practice*, 6th ed., 1921, p. 2448). "Again, the statute refers to state statutes governing substantive rights; it does not apply to state statutes of procedure" (Dobie, *Federal Procedure*, 1928, p. 560).

Had the *Stetson* case applied the Conformity Act, there would have been an indication that this Court considered the question of compulsory physical examination to be only a matter of practice, and so one that could be dealt with in the Federal Rules of Civil Procedure. This is apparent from the fact that the Advisory Committee's note to Rule 35 stated that in the *Stetson* case the state statute was "made operative by the conformity act" (this curious error is discussed in this brief at pp. 49-50). But in fact the Rules of Decision Act was applied in the *Stetson* case, indicating clearly that this Court has held the question of compulsory physical examination to involve the substantive rights of the litigant.

Another aspect of the *Stetson* case seems to be misconstrued in the opinion of the Circuit Court of Appeals in the instant case. The opinion says (R. 17) that the language of the opinion in the *Stetson* case indicates that the right to be free from a compulsory physical examination is not substantive. The language relied on is as follows:

> "It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the State to recover damages for injury to the person."

The context shows clearly that Mr. Justice Peckham was merely saying that the question involved was not one of those questions of general law as to which a federal court was not bound to follow the decisions of state courts under the doctrine of *Swift* v. *Tyson*. So to classify the question does not mean that it is not "substantive"; it merely means that it is not one kind of "substantive" rule.

C. The Substantive Character of the Right Modified by Rule 35 Is Indicated by the Questions of Legislative Policy Involved in the Promulgation of the Rule.

The considerations of policy involved in the determination to grant or not to grant courts the power to compel a physical examination are of such a nature that the granting of the power is a "substantive" matter which Congress did not intend to delegate to this Court.

It has been noted above in this brief (p. 24) that courts are given the rule-making power because of their familiarity with details of practice, while the determination of broader questions of public policy rests with the legislature. The question of whether or not the federal courts should have the power to order a physical examina-

tion presents questions of public policy for decision. It is not a matter of "filling in details". If Congress passed a statute granting the power to the courts, this Court could be given authority to "fill in details" by providing by rule how the order may be obtained, what use may be made of the examiner's report, etc. But the determination of the broad general question of granting or not granting the power is clearly within the competence of Congress. And it would seem that Congress did not intend to delegate the determination of this type of question to the Court in the Rules Enabling Act.

This case involves the validity of Rule 35 and not its desirability. But the arguments for and against the rule indicate that its promulgation presented either a legislative question or a question the determination of which would modify, enlarge, or abridge "substantive" rights.

The arguments *for* granting the power to courts have been stated in a number of judicial opinions of state courts which have held, contrary to the holding in the *Botsford* case, that a court had inherent power to compel a physical examination in the absence of a statutory provision. These arguments are: actions for damages for personal injury are often attempted to be sustained by malingering and false testimony; the discovery of truth in the courts is of greater importance than any merely personal considerations; the courts should not be deterred by false delicacy, as was the Supreme Court in the *Botsford* case, from taking such measures as common sense requires for determining the truth; in seeking redress from a court for a personal injury the plaintiff should be compelled to submit the injury to expert examination. These arguments are made in 4 *Wigmore on Evidence* (2d ed. 1923) sec. 2220, p. 728 *et seq.*, where a number of cases are cited with quotations from the opinions.

The arguments *against* granting the power involve the practical aspects of Rule 35. There is of course the invasion of the person of the plaintiff by an examiner not of the plaintiff's own choosing, for which there was held in the *Botsford* case to be no precedent in the common law. Also, the practical aspects of the trial of personal injury cases indicate the desirability of proceeding cautiously with the granting of the power to the courts.

Defendants do not seek to have the judge appoint a medical expert to examine the plaintiff merely for purposes of discovery—perhaps the chief reason for seeking the examination is to qualify a witness for testifying at the trial. All that the plaintiff and the plaintiff's physician know about the plaintiff's injuries can be discovered by the defendant by the taking of depositions under Rule 26. A physician appointed by the court comes before the jury bearing the stamp of court approval of his impartiality and skill (it has already been held under Rule 35 that an examining physician appointed under the rule becomes an officer of the court. *The Italia* (D.C. N.Y. 1939) 27 F. Supp. 785). In the uncertain field of medical diagnosis and prognosis disagreement among the experts is notorious. Yet the testimony of one expert—the physician appointed by the judge—is bound to carry almost as much weight with the jury as a pronouncement by the judge himself.

One reason for caution is the difficulty of obtaining skilled and impartial physicians who can be relied on to make careful examinations. And the examination is likely to be brief, at least in comparison to the examination made by the attending physician who testifies for the plaintiff. Judges are likely to appoint a physician named by the defendant. Although the judge gives the plaintiff an opportunity to object to the appointment of a physician

named by the defendant, the plaintiff may not know facts that make his appointment undesirable, such as his frequent employment by defendants or his lack of knowledge of the particular field of medicine involved. It is very easy for a physician who is biased or merely uninformed to make an inaccurate report. Also, there is no provision in Rule 35 for the payment of the appointed physician, as indeed it would have been difficult to do unless it had been provided that the person seeking his appointment—*i.e.*, the defendant—pay him. This, of course, will be the result under the rule. And since the physician is paid by the defendant (and perhaps nominated by the defendant) —although he testifies as a court official—his report is likely to favor the defendant's side of the case.

While it is true, as Mr. Wigmore and the judges in the cases cited by him say, that fraudulent claims of personal injury are sometimes made in the courts, it is also true that defendants sometimes resort to unscrupulous tactics to avoid liability for just claims or to decrease the amount of damages. The possibility of having physicians appointed to examine plaintiffs under the rather free provisions of Rule 35 will give unscrupulous defendants opportunities to destroy and weaken valid claims. The danger in this possibility may easily outweigh the benefits expected to be derived from Rule 35 in exposing fraudulent claims, for which, of course, there are many other devices available.

These arguments against the desirability of Rule 35 indicate that the promulgation of the rule involved the determination of important questions of public policy.

Another consideration of policy is that Rule 35 (and it seems to be unique among the rules in this respect) benefits entirely only one group of litigants—defendants who are

resisting claims arising from personal injuries. And similarly Rule 35 discriminates against another group—the plaintiffs who have claims for personal injuries. The arguments against the rule indicate that it can easily give defendants unfair advantages. Its importance to this group of litigants is apparent from an article entitled "New Federal Rules of Civil Procedure and Defense of Tort Actions Covered by Casualty Insurance," 25 A.B.A. Jour. 348 (April, 1939) where (p. 349) the first step suggested under the rules is the procuring of an order under Rule 35. Whether or not this group of litigants should be given the advantages of a physical examination of the plaintiff and of testimony by a court officer seems to involve a question of policy for the legislature to determine.

Another consideration of policy arises from the relationship of the federal to the state courts. Should the federal courts have the power to compel plaintiffs to submit to physical examinations in states where the state courts do not have this power? This seems to be a matter of policy for Congress to decide, particularly since in at least one state—Illinois (see the cases noted in this brief at pp. 13-15)—the decisions indicate a strong policy against compelling physical examinations. Also, an increase in the number of cases removed to the federal courts as a result of the rule seems likely, thus presenting a question of policy for Congress to decide. There are a number of states in which the courts have refused to order a physical examination and in which no statute permits the order. See 4 *Wigmore on Evidence,* cited above in this brief at p. 12. Among them are large industrial states such as Illinois and Massachusetts. Since Rule 35 benefits solely the defending side in litigation, defendants in personal injury and disability insurance cases are likely in almost every case to seek removal to a federal court from a state

court which does not have the power to order a physi
examination. The procedural advantages of the otl
rules over unreformed state procedure benefit equally t
plaintiff and the defendant, so that they do not make
particularly desirable for one party or the other to res
to a federal court. If one party removes the case, t
other will also receive the benefits of the rules. But Ru
35 is useful only to a party defending against a claim.

It seems unlikely that Congress in passing the Rul
Enabling Act intended to delegate to this Court the d
termination of the questions of public policy noted abo
The character of these questions indicates that Rule
involves the "substantive rights" of litigants.

D. Comparison of Rule 35 with Other Rules.

Of the eighty-six Federal Rules of Civil Procedure, Ru
35 is unique in several important respects. No other ru
authorizes the invasion of a right that this Court has call
"sacred," as in the *Botsford* case. No other rule benef
so obviously one class of litigants alone. No other ru
applicable to actions at law presents questions of pub
policy which seem to be so clearly within the competen
of Congress.

Rule 35 is grouped with Rules 26 to 37 in Title V of t
Rules under the heading "Depositions and Discovery
While Rule 35 may seem superficially to involve merely
question of discovery, in fact it differs markedly from t
other rules in Title V.

In one aspect the other rules in Title V represent
mere shifting of a device for obtaining facts from o
stage of the proceeding (the trial) to an earlier sta
Rule 26 permits the taking of depositions before trial "f
the purpose of discovery." Rule 33 provides a meth

by which one party may obtain the answers of another party to written interrogatories. And Rule 34 makes it possible for a party to obtain the discovery and production of documents and things for inspection, copying, or photographing. These rules, in so far as they make innovations in federal practice, merely permit a litigant to obtain *before trial* the discovery of matters that have always been provable at the trial by testimony obtainable by a *subpoena ad testificandum* or a *subpoena duces tecum*. This shift does not involve a change in substantive rights. Also, litigants have been able to obtain in equity some of the same remedies that are provided by Rules 26, 33, and 34, which thus do not effect a change in rights. On the other hand, the opinion in the *Botsford* case (as noted above in this brief at p. 31) indicated clearly that a court could not compel a litigant to expose his body at the trial for examination either by the jury or by medical experts. Thus, Rule 35, in providing a method of physical examination *before trial*, would permit what has not been heretofore permitted at the trial or at any other stage of the proceeding. Also, as pointed out by Mr. Justice Holmes in the *Stack* case (quoted above in this brief at p. 34), an order for a physical examination was not procurable in equity. These considerations show clearly why Rule 35 may be said to abridge substantive rights while Rules 26, 33, and 34 do not.

Also, as a discovery device, Rule 35 is of little value, at least in a court sitting in a state where communications between patient and physician are not privileged (Illinois is one of those states, there being no statute that grants the privilege). By taking the deposition of the plaintiff and the plaintiff's own physician, the defendant is able to discover all that the plaintiff knows about the plaintiff's own case.

Rule 43 is entitled "Evidence." An order for a physical examination may perhaps be classified under this same broad heading; indeed it has been considered to be within the scope of a treatise on evidence, Mr. Wigmore having discussed the subject under the title "Privilege," 4 *Wigmore on Evidence* (2d ed. 1923) 723, sec. 2220. And in *Chicago & N. W. Ry. Co.* v. *Kendall*, 167 Fed. 62 (C. C. A. 8th, 1909), the well-known opinion of Judge Amidon indicated that an order for a physical examination involved the law of evidence. Yet Rule 35 is entirely different in character from Rule 43. Paragraph (a) of Rule 43 deals with the important subject of the admissibility and competency of evidence in federal courts. Evidence is said to be admissible or competent when admissible or competent "under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held." This is merely a sort of conformity provision and does not extend or restrict the rules which heretofore applied. No litigant may therefore complain that a rule of admissibility or competency that may involve substantive rights has been changed to his detriment by Rule 43(a). Thus, the principles which plaintiff contends render Rule 35 invalid do not apply to Rule 43(a).

This comparison of Rule 35 with the other rules that are most similar to it in subject-matter indicates that Rule 35 stands out as a rule of an entirely different character from the other Federal Rules of Civil Procedure. The difference is that Rule 35 more obviously affects substantive rights than the other rules.

E. Conclusion: Rule 35 Abridges the Substantive Rights of the Plaintiff and is Invalid as to the Plaintiff.

The opinions and decisions in the *Botsford* and *Stetson* cases as well as the nature of the questions involved in Rule 35 indicate that the rule modifies substantive rights contrary to the intention of Congress as expressed in the Rules Enabling Act. Insofar as Rule 35 applies to the ordering of a physical examination authorized by the Rules of Decision Act in connection with a state statute or state court decision of the state in which a federal court is sitting, it may not be invalid, since as noted by Mr. Justice Brandeis in the *Washington Southern Navigation Co.* case (cited above p. 20) a rule of court is occasionally employed "to express in convenient form * * *a principle of substantive law which has been established by statute or decisions." But an order for a physical examination is not permitted in the state courts in Illinois either by statute or state court decision. The only federal statute that could be claimed to authorize an order in a federal court sitting in Illinois is the Rules Enabling Act and, as shown by the argument made in this brief, that Act was not intended by Congress to permit the modification of substantive rights.

By its terms Rule 35 would permit a federal court sitting in Illinois to order a physical examination, and it was so construed in this case by the District Court and the Circuit Court of Appeals. To that extent Rule 35 modifies and abridges the substantive rights of the plaintiff and is invalid.

III. The Fact that this Court and Congress Duly Co sidered Rule 35 Does Not Preclude the Plaintiff fro Questioning its Validity, Particularly in View of th Error in the Advisory Committee's Note to the Rul

Rule 35 is perhaps unique among the rules in that prio decisions of this Court had denied federal courts what th rule grants—the power to order a physical examinatio These prior cases were discussed in the *Notes* of the Ad visory Committee appointed by the Supreme Court t assist it in the preparation of the rules. The languag dealing with these cases was as follows:

> "In *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 25 (1891), it was held that the court could not order th physical examination of a party in the absence o statutory authority. But in *Camden and Suburba Ry. Co.* v. *Stetson,* 177 U. S. 172 (1900) where ther was statutory authority for such examination, derive from a state statute made operative by the *conformit act* (italics supplied), the practice was sustained. Suc authority is now found in the present rule made opera tive by the Act of June 19, 1934, c. 651, U. S. C., Tit 28, secs. 723b (Rules in actions at law; Supreme Cou authorized to make) and 723c (Union of equity an action at law rules; power of Supreme Court). (*Notes to the Rules of Civil Procedure for the Distric Courts of the United States,* March, 1938, p. 32, pre pared and printed under the direction of the Ad visory Committee on Rules for Civil Procedure.)

The cases cited in the note were commented on in th opinion of the Circuit Court of Appeals in the instan case in the following language:

> "It follows, that regardless of prior court dec sions holding to the contrary, both the Suprem

Court and Congress have construed the right as not being substantive as that term was used in the Enabling Act. If we had any doubt otherwise (which we haven't) that the Supreme Court, in the adoption of the rule in question, was familiar with and considered its prior decisions in *Union Pacific R. R. Co.* v. *Botsford, supra,* and *Camden and Suburban R. R. Co.* v. *Stetson, supra,* that doubt is dispelled by the fact that those two cases were cited and discussed in the notes of the Advisory Committee. (See note following Rule 35, U. S. C. A.) We therefore conclude that the Supreme Court did not exceed the power conferred by Congress and that the rule is valid and has the effect of legislative enactment'' (R. 16).

It is readily conceded that it would be most unfortunate if the Federal Rules of Civil Procedure could be easily invalidated after they have been so carefully prepared by the Advisory Committee and so thoroughly considered by the Court during the various stages of their promulgation. Nevertheless, the fact remains that a rule that abridges or modifies a substantive right is invalid under the Enabling Act, regardless of the action of the Court and Congress.

Also, it is obvious that the fact that the Court and Congress have fully considered the rules imposes a heavy burden on the petitioner in urging the invalidity of Rule 35.

But the importance of this fact is minimized in the case of Rule 35 by the further fact that the note of the Advisory Committee to Rule 35 contains a significant error in its discussion of the *Stetson* case. The note says that the Act of Congress that rendered the state statute operative was ''the conformity act''. It is pointed out above in this brief (pp. 37-8) that the *Stetson* case held, not that the

Conformity Act furnished the necessary statutory authority, but that the *Rules of Decision Act*, in connection with the applicable state statute, permitted an order for a physical examination. It is also pointed out above (p. 38) that the Rules of Decision Act has generally been considered to deal only with substantive rights, and that the Conformity Act has generally been considered to deal with matters of procedure. If the *Stetson* case had applied the Conformity Act, it would show that this Court had held that the matter involved was solely one of procedure. On the other hand, the fact that the Rules of Decision Act was applied indicates that this Court in the *Stetson* case considered an order for a physical examination to involve substantive rights. As a result of the erroneous statement in the note to Rule 35 that the *Stetson* case applied the Conformity Act, anyone reading the note would naturally believe that this Court had considered an order for a physical examination not to involve substantive rights.

The publications of the Advisory Committee do not indicate whether or not the error mentioned above was in the *Notes* of the Advisory Committee when Rule 35 was considered by this Court. The pamphlet containing the Note quoted above was published in March, 1938, which was after this Court had adopted the rules by the order of December 20, 1937 (302 U. S. 783). The report of the Advisory Committee published in April, 1937, did not refer to the *Stetson* case in its note to Rule 35. *Report of the Advisory Committee on Rules for Civil Procedure*, April, 1937, p. 88.

It is apparent, however, that the *Notes* of March, 1938, were available to Congress when it considered the rules. The rules were reported to Congress pursuant to the Rules

Enabling Act early in January, 1938. On May 30, 1938, a joint resolution was introduced to postpone the effective date of the rules and in the Senate the resolution was referred to the Judiciary Committee. 83 Cong. Rec. 4345 (1938). The report of that Committee recommended that the resolution of postponement pass, and asked specifically the question of whether or not several of the rules, including Rule 35, violated "substantive rights". 83 Cong. Rec. 8474-75. The resolution (which was not adopted) and the report of the Judiciary Committee were discussed on the floor of the senate on *June 8, 1938* (83 Cong. Rec. 8473-83), when the *Notes* of March, 1938, were available. The erroneous statement in the note to Rule 35, indicating by its reference to the Conformity Act that this Court had held that an order for a physical examination did not involve substantive rights, was thus before Congress when it considered the rules and failed to postpone their effective date.

The portion of the opinion of the Circuit Court of Appeals quoted above stated that this Court and Congress must have construed the right asserted by the plaintiff here not to be substantive. If this is true, it seems likely that the error in the note to Rule 35, which was not pointed out in the opinion, may have contributed to the construction so made, for the error involved this very crucial question. Certainly the error indicates that this Court should not be reluctant to re-examine the question of whether or not Rule 35 modifies substantive rights.

IV. The Law of Indiana Does Not Furnish Authority for the Order Directing the Plaintiff to Submit to a Physical Examination.

It was argued by the defendant in the Circuit Court of Appeals that the order directing the plaintiff to submit

to a physical examination was supported, aside from Rule 35, by the fact that the alleged tort occurred in the State of Indiana whose courts hold that a court has inherent power to order a physical examination. *City of South Bend* v. *Turner*, 156 Ind. 418, 60 N. E. 271 (1901). The argument was that if an order for a physical examination involves substantive law, the law of Indiana governs. And that under the Rules of Decision Act as interpreted in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the rule announced by the Indiana courts must be followed by a federal court.

The defect in this argument is that it overlooks the fact that an order for a physical examination is governed by the law of the forum. This is true even if the order involves the "substantive rights" of the plaintiff as contended in Point II of this brief. In Point II it is argued that the order involves "substantive rights" even though it is a matter of "procedure". Certainly it is a matter of "procedure" within the rule that the law of the forum governs procedure.

This is apparent from the *Restatement, Conflict of Laws*, (1934). The rule is stated as follows (sec. 585): "All matters of procedure are governed by the law of the forum." What is meant by the word "procedure" in the rule is discussed at pp. 700-701:

> "A limitation upon the scope of the reference to the foreign law is thus necessary. Such limitation excludes those phases of the case which make administration of the foreign law by the local tribunal impracticable, inconvenient, *or violative of local policy.* In these instances, the local rules at the forum are applied and are classified as matters of procedure." (Italics supplied.)

Thus, the word "procedure" is used arbitrarily in this rule to include what is governed by the law of the forum. And a foreign law "violative of local policy" is not followed under the rule.

It has been pointed out above (pp. 13-15) that there is a strong policy in Illinois against the granting of orders for a physical examination. For this reason, it is inconceivable that an Illinois state court would order a physical examination in a case where the tort occurred in another state where the courts enter orders of that kind. The law of the forum that a federal court applies is the law of the state where the court sits—in this case, Illinois. There is thus no basis for applying the Indiana law.

Another indication that the law of Illinois applies is the fact that an order for a physical examination forms a part of the law of evidence (see authorities cited in this brief, p. 46), to which the law of the place where the suit is brought applies. See *Central Vt. Ry. Co.* v. *White*, 238 U. S. 507 (1915) where Mr. Justice Lamar stated (p. 511):

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of action, sufficiency of the pleadings, *rules of evidence*, and the statute of limitations—*depend upon the law of the place where the suit is brought.*" (Italics supplied.)

That the law of Illinois governs is also apparent from the opinion of this Court in the *Stetson* case (cited above at p. 34). At several points Mr. Justice Peckham indicated that under the Rules of Decision Act it was the statute of the state *in which the federal court was sitting* that authorized the order for a physical examination. See 177 U. S. 175:

> "But we say there is a law of the United States which does apply the laws of the state *where the United*

States court sits; and where the state has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in *Federal courts sitting in that state.*"

And p. 177:

"But by reason of the statute of New Jersey, in which state this action was brought, there being no law of Congress in conflict therewith, we hold that the courts of the United States *therein sitting* have the power, under the statute and by virtue of sec. 721 of the Revised Statutes of the United States, to order the examination of the person of the plaintiff . . ." (Italics supplied.)

Thus, no matter how an order for a compulsory physical examination may be classified in determining whether or not it modifies the substantive rights of a litigant, it is clear that it is classified as a rule of procedure within the rule that the law of the forum governs procedure. The law of Indiana has no bearing on the validity of the order involved in the instant case.

V. Conclusion.

This Court has held that a person has a right not to be compelled to submit to a physical examination. The Illinois courts are committed to the same doctrine. The arguments made in this brief indicate that the right is "substantive". Rule 35 of the Federal Rules of Civil Pro-

cedure, as applied in this case, destroys this right of the plaintiff and thus exceeds the limitation contained in the Rules Enabling Act. And Rule 35 furnishes the only possible ground for the order entered directing the plaintiff to submit to a physical examination. That order is therefore invalid, as is also the judgment of contempt entered for disobedience of the order.

We submit that this Court should take jurisdiction of the case and reverse the decision of the Circuit Court of Appeals.

Respectfully submitted,

LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN AND
JAMES A. VELDE,
Of Counsel.